No. 21

# In the Supreme Court of the United States

OCTOBER TERM, 1954

RAY BROOKS, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

SIMON E. SOBELOFF,
*Solicitor General,*
*Department of Justice,*
*Washington 25, D. C.*

GEORGE J. BOTT,
*General Counsel,*
DAVID P. FINDLING,
*Associate General Counsel,*
DOMINICK L. MANOLI,
*Assistant General Counsel,*
FANNIE M. BOYLS,
WILLIAM J. AVRUTIS,
*Attorneys,*
*National Labor Relations Board,*
*Washington 25, D. C.*

# INDEX





312863—54——1

## CITATIONS

Cases:

Cases—Continued

Cases—Continued

Cases—Continued

# In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 21

RAY BROOKS, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The opinion of the Court of Appeals (R. 66–84) [1] is reported at 204 F. 2d 899. The findings of fact, conclusions of law, and order of the Board (R. 6–19, 24–27) are reported at 98 N. L. R. B. 976.

### JURISDICTION

The decision of the court below and its decree enforcing the Board's order were entered on May 14, 1953 (R. 84, 85–88). A petition for rehear-

[1] References to the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following a semicolon are to the supporting evidence.

ing, filed on June 2, 1953, was denied on December 16, 1953 (R. 89). The petition for a writ of certiorari was granted on March 8, 1954 (R. 91). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1) and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

## QUESTION PRESENTED

After an election in which a majority of petitioner's employees in an appropriate bargaining unit selected a union as their bargaining representative, the National Labor Relations Board certified the union as such representative. A week after the election was held and prior to the issuance by the Board of its certification, petitioner and the union received a document signed by a majority of the employees stating that they did not wish the union to represent them. Petitioner thereupon refused to deal with the union.

The question presented is whether, despite this repudiation of the union by the employees, the Board was entitled to hold that petitioner was required to bargain collectively with the union for a reasonable period of time following the election.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, before amendment (49 Stat. 449), 29 U. S. C. (1946 ed.) 151, *et seq.*) and after amendment (61 Stat. 136, 65 Stat. 601, 29 U. S. C., 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 49–58.

## STATEMENT

### I. THE BOARD'S FINDINGS, CONCLUSIONS, AND ORDER

Pursuant to a consent election conducted by the National Labor Relations Board's Regional Director on April 12, 1951, petitioner's employees in an appropriate collective bargaining unit, by a vote of eight to five,[2] selected the Union (International Association of Machinists, District Lodge No. 727) as their bargaining representative (R. 9; 3–4, 31–37). No objections to the election were filed and on April 20, 1951, the Regional Director, on behalf of the Board, certified the Union as the employees' bargaining representative (R. 9; 39, 30).

On April 19, the day before the certification issued, petitioner and the Union each received in the mail a document bearing the purported signatures of nine of the thirteen employees who had cast valid ballots in the election (R. 9–10; 37–38, 45, 48, 47). This document (R. 10; 45) read as follows:

April 18, 1951

> We, the undersigned majority of the employees of Ray Brooks, Chrysler-Plymouth Dealer, 6530 Van Nuys Blvd., Van Nuys,

[2] All of the employees in the unit, numbering 15, voted. Two ballots, however, were challenged on the ground that they had been cast by employees of supervisory status (R. 9). The tally of the other votes cast made it unnecessary to resolve these challenges.

> Calif., are not in favor of being represented by union local No. 727 as a bargaining agent. We respectfully submit this petition for your consideration.

Thereafter, in response to the Union's request for a bargaining conference, petitioner, by his counsel, replied by letter on May 1 (R. 16; 40, 41). In this letter petitioner stated that he had "been given to understand" that a majority of the employees had repudiated the Union and no longer wished to be represented by it. Petitioner then stated that, in a recent decision, the Court of Appeals for the Sixth Circuit had held that an employer could not be compelled to bargain with a union under such circumstances. He concluded by inquiring whether it would not "be wiser to defer consideration of the proposed negotiations until such time as it might appear that the employees desire to have your union represent them" (R. 16–17; 42). There was no evidence of any other communication between the parties (R. 17).

On the basis of the above facts, the Board concluded that petitioner's letter of May 1 constituted a refusal to bargain with the certified Union, in violation of Section 8 (a) (5) and (1) of the National Labor Relations Act. The Board, following its settled rule that the selection of bargaining representatives by employees in a Board-conducted election is normally valid and conclusive for a reasonable period of time, usually one

year—despite any intervening shift of employee sentiment as to their choice of representatives—held that the purported repudiation of the Union by the employees a few days after the election did not constitute such special circumstances as to impair the Union's representative status. Accordingly, it concluded that petitioner's refusal to bargain with the Union on and after May 1, 1951, was not excused by petitioner's receipt on April 19 of the purported repudiation by the employees of their elected bargaining representative (R. 11–14).[3]

The Board ordered petitioner to cease and desist from refusing to bargain and from in any manner interfering with the efforts of the Union to bargain with him. Affirmatively, it ordered petitioner, upon request, to bargain with the Union and to post appropriate notices (R. 25–27, 23).

## II. THE DECISION OF THE COURT BELOW

The Court of Appeals enforced the Board's order (R. 84). Treating as authentic the purported communication of the employees repudiating the

[3] The Board's trial examiner also discounted the weight to be accorded to the purported communication of the employees repudiating the Union since no evidence was introduced to establish the authenticity of the document (R. 14–16). The court below accepted the document as authentic and, for purposes of its decision, took it as a fact that a majority of petitioner's employees repudiated the Union on April 18, 1951 (R. 70–71). Argument here does not turn upon the authenticity of the document in question.

Union, the court nevertheless affirmed the Board's conclusion that petitioner had unlawfully refused to bargain with the Union on and after May 1, 1951, and that the employees' repudiation of their elected representative afforded no justification for petitioner's refusal to bargain collectively with the Union (R. 70–71). It agreed with the Board that the objectives of the statute and its legislative history require that the choice of a bargaining representative made by employees in an election conducted by the Board pursuant to the Act be, in the absence of unusual circumstances, valid and conclusive for a reasonable period of time despite any intervening shift of employee sentiment as to their choice. Applying this rule to the instant case, the court held that "it is plain that when the employees repudiated the Union one week after the election a 'reasonable time' had not passed to give the bargaining relationship a fair chance to succeed. No unusual circumstances appear. Accordingly, the Board was justified in concluding that the Union continued to be the bargaining representative of the employees and that [petitioner's] refusal to bargain constituted an unfair labor practice" (R. 83–84).

## SUMMARY OF ARGUMENT

A. Both the original and amended Act empower the Board, whenever a question of representation of employees exists, to direct an election by secret ballot and to certify the result. When the Board,

following such election, certifies that a union has been selected as their bargaining representative by a majority of the employees in an appropriate unit, the union acquires an exclusive and statutorily protected right to bargain with the employer on behalf of all the employees in the unit with respect to terms and conditions of employment.

Neither the original nor amended Act specifies in terms the length of time that the union is entitled to enjoy that exclusive status without being required to meet a claim that changed circumstances have resulted in a loss of its majority. Congress necessarily left the determination of that question to the Board in the exercise of its function to give content and meaning to the broad provisions of the Act and "coordinated effect to the policies of the Act." *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 348.

One of the major objectives of the Act is to guarantee to employees freedom of choice in their selection of representatives for purposes of collective bargaining. Another, and equally important, objective is to stabilize industrial relations through collective bargaining. For "collective bargaining is not an end in itself, it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advan-

tageous both to the worker and the employer." H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.

In administering the representation features of the Act and fixing the operative period of a certification of bargaining representatives, the Board has been faced with the necessity of harmonizing and striking a fair accommodation between these two basic but somewhat divergent aims, and balancing the advantages of stability in labor relations against the desirability of affording employees an unlimited freedom to choose representatives at will. While recognizing that the employees possessed an undoubted power to recall an elected representative, the Board nevertheless concluded that effectuation of the statutory policy to stabilize industrial relations necessarily required that a bargaining representative, duly chosen in a Board-conducted election, must be permitted to exist and function for a reasonable period, irrespective of any intervening shift in its majority status. Accordingly, giving coordinated effect to the statutory objectives, the Board adopted the rule that, absent unusual circumstances, a bargaining representative chosen by the employees in a Board-conducted election is entitled to recognition for a reasonable period of time, usually one year, without regard to any evidence of intervening repudiation by the employees or change in their choice of representatives.

B. The Board's "reasonable period" rule represents an appropriate and valid administrative

accommodation, which the Court should accept, between the dual statutory objectives to foster stability in industrial relations through collective bargaining and to assure employees full freedom of self-organization. Manifestly, an election by secret ballot, hedged by the careful safeguards which the Board has adopted, is the most effective and reliable device to ascertain the employees' free and deliberate choice of bargaining representatives. Once the employees have formally and deliberately registered their choice under full governmental protection and through secret ballot, it is reasonable to require, in view of the public interest in preserving stable industrial relations as well as the practical operation of the collective bargaining process, that there be some measure of permanence to the relationship and that employees be held to their choice for a reasonable time. The legislative purpose to stabilize labor relations for a period through the making of collective bargaining agreements would probably fail of achievement unless, as this and other courts (with one exception) have held, "a bargaining relationship once rightfully established [is] permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, 705. Quite properly, the Board has felt that neither it nor the courts can stand by constantly and continually to

reexamine the employees' wishes and redetermine their current choice of representatives; the line must be drawn at some point of time.

A contrary rule does not make for industrial stability nor is it conducive to harmonious labor relations. It would render difficult, if not impracticable, the making of collective bargaining agreements. For neither the employer nor the representative of the employees could enter into negotiations for that purpose with any assurance that before the consummation of a contract the employees' representative would not be divested of its authority to bargain on their behalf. Nor, if a contract were consummated, would there be any assurance that it would stabilize the employment relationship for its duration. For to permit employees to choose representatives at will might well result in leaving them either without a representative to administer the contract or, possibly, a series of representatives, all strangers to the agreement, to administer it as best as they could or even to repudiate it. Finally, a Board representation election instead, as Congress intended, "of inaugurating a period of industrial repose, would lead only to continued raiding of the bargaining agent's membership and the disrupting influence of rival union activities within the bargaining unit" (opinion below, R. 83).

The Board's policy avoids these consequences. That policy recognizes the necessity in a democratic scheme of representation of subordinating,

for a time, shifts in employee sentiment in favor of stability in employer-employee relations and thereby attaining the statutory goal of industrial peace under collective agreements. The Board's policy thus accords with the basic scheme of the Act's representation procedures. Congress, in adopting the majority principle of representation, consciously followed "our governmental practices, * * * business procedure, and * * * the whole philosophy of democratic institutions" (S. Rep. No. 573, 74th Cong., 1st Sess., p. 13). Just as the practical operation of our political institutions requires that shifts in the sentiment of the electorate be subordinated in favor of stability in government, so stability in labor relations requires that a measure of permanence be accorded to the status of a duly elected bargaining representative, irrespective of changing sentiment among the employees.

C. The amended Act and its legislative history demonstrate that Congress accepted the rule adopted by the Board and approved, with only one exception, by the courts of appeals. In 1947 Congress amended the Act to provide, *inter alia*, that "No election shall be directed [by the Board] in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." Section 9 (c) (3). The legislative debates and reports on this amendment establish that Congress was fully

aware of the Board's "reasonable period" rule; that it was the object of explicit mention and approval in Congress; and that Section 9 (c) (3) was in part designed to codify that rule. Both divisions of Congress agreed that when a union won a representation election, "its majority cannot be challenged for a year" and it "remains the bargaining agent until the end of that year" (93 Cong. Rec. 3838, S. Rep. No. 105, 80th Cong., 1st Sess., p. 25). In these circumstances, it is a fair inference that Congress accepted the Board's construction of the Act. Cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365, 366.

## ARGUMENT

### THE NATIONAL LABOR RELATIONS BOARD AND THE COURT BELOW PROPERLY HELD THAT THE CHOICE OF BARGAINING REPRESENTATIVE MADE BY EMPLOYEES IN AN ELECTION CONDUCTED BY THE BOARD PURSUANT TO THE NATIONAL LABOR RELATIONS ACT IS NORMALLY VALID AND CONCLUSIVE FOR A REASONABLE PERIOD OF TIME

The single question presented here is whether under the Act the selection of a bargaining representative by employees by secret ballot, in a Board-conducted election, may normally be deemed valid and conclusive for a reasonable period of time regardless of any intervening shift of sentiment among the employees as to their choice, or whether the employees may voluntarily disavow or repudiate their duly elected representative at

will.[4] Answering this question and epitomizing the controlling considerations, ~~Judge Learned Hand, speaking for~~ the Court of Appeals for the Second Circuit, said in 1944 (*National Labor Relations Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, 542–543, certiorari denied, 323 U. S. 714):

> The purpose of the Act is to insure collective representation for employees, and to that end § 9 gives power to the Board to supervise elections and certify the winners as the authorized representatives. Inherent in any successful administration of such a system is some measure of permanence in the results: freedm to choose a representative does not imply freedom to turn him out of office with the next breath. As in the case of choosing a political representative, the justification for the franchise is some degree of sobriety and responsibility in its exercise. Unless the Board has power to hold the employees to their choice for a season, it must keep ordering new elections at the whim of any volatile caprice; for an election, conducted under

[4] This question was left open in this Court's decision in *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 684–685. It was not conclusively resolved by *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, because there, unlike here, the loss of majority status by the bargaining representative was attributable to the employer's unfair labor practices. However, as we show below, pp. 25–34, the considerations which were decisive in *Franks Bros.* are in large measure also controlling here.

> proper safeguards, provides the most reliable means of ascertaining the deliberate will of the employees.

We submit that this principle, disputed only by the Court of Appeals for the Sixth Circuit,[5] governs this case. As we show below, the Board early in its administration of the Act enunciated the rule that the choice of bargaining representatives made in a Board-conducted election is usually binding for a reasonable period of time; the rule represents an appropriate and valid accommodation between fundamental but somewhat divergent policies and purposes of the Act; it has received the almost uniform approval of the courts both before and after the 1947 amendments to the Act; and, finally, Congress, in adopting the 1947 amendments to the Act, carefully considered and ratified the Board's established rule.

A. THE BOARD'S RULE IS THAT THE DULY ELECTED BARGAINING REPRESENTATIVE IS NORMALLY ENTITLED TO RECOGNITION FOR PURPOSES OF COLLECTIVE BARGAINING FOR A REASONABLE PERIOD OF TIME, USUALLY ONE YEAR

The original Act, like the amended Act, empowered the Board, whenever a question of representation of employees exists, to direct an election by secret ballot and to certify the results. Sec-

[5] See *Mid-Continent Petroleum Corp.* v. *National Labor Relations Board*, 204 F. 2d 613 (C. A. 6), certiorari denied, 346 U. S. 856. All the other courts which have considered the issue have indorsed the principle. See cases cited and discussed, *infra*, pp. 25–27, 45–46.

tion 9, *infra*, pp. 50–51, 55–58. When the Board, pursuant to the Act, certifies that a union has been selected as their bargaining representative by a majority of the employees in an appropriate unit, the union acquires an exclusive and statutorily protected right to bargain with the employer on behalf of all the employees in the unit with respect to terms and conditions of employment. *Id.*; *Medo Photo Supply Corporation* v. *National Labor Relations Board*, 321 U. S. 678; *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376.

Neither the original nor the amended Act specifies in terms the length of time the union is entitled to enjoy that exclusive status without being required to meet a claim that changed circumstances have resulted in a loss of its majority. Congress, in vesting the Board with "the responsibility of exercising its judgment in employing the statutory powers" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194), necessarily left the determination of this question to the Board in the light of the general policies and purposes of the Act and the Board's specialized experience in the field of labor relations. "How long the employees' undoubted power to recall an elected representative may be suspended, is a matter primarily, perhaps finally, for the Board * * *." *National Labor Relations Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, 543 (C. A. 2), certiorari denied, 323

U. S. 714. As this Court has declared, "A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application." *Phelps Dodge Corp., supra.* Cf. *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 798; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, 130; *National Labor Relations Board* v. *Seven-Up Bottling Co.,* 344 U. S. 344; *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.,* 344 U. S. 392, 394.

One of the major objectives of the Act is to provide employees "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Section 1, *infra,* pp. 49–50, 51–53. A second, and no less important, objective of the Act is to "encourag[e] the practice and procedure of collective bargaining" for "the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." Section 1, *ibid.* Explaining the underlying purpose of the statutory objective, the Senate Report on the original Act stated, "The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards

of working conditions." S. Rep. No. 573, 74th Cong., 1st Sess., p. 13. Similarly, the House Report declared, "As has frequently been stated, collective bargaining is not an end in itself; it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advantageous to both the worker and the employer." The Report further added, "stability * * * is one of the chief advantages of collective bargaining." H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.[6]

In administering the representation features of the Act, and fixing the operative period of a certification of bargaining representatives, the Board was thus faced from the outset with the problem of harmonizing, and striking a fair accommodation between, these two basic, but somewhat divergent, aims of the Act, and of balancing the advantages of stability in collective bargaining and labor relations against the desirability of affording employees full and unlimited freedom in their choice of representatives. As this Court has pointed out, "It is the business of the Board to give coordinated effect to the policies of the Act." *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 348.

---

[6] See, also, *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 526; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236.

The Board early came to the conclusion that, while employees possessed an undoubted power to recall an elected representative, effectuation of the statutory policy to stabilize industrial relations through collective bargaining required that a bargaining relationship, rightfully established through a Board election, must be permitted to exist and function for a reasonable period despite any evidence of repudiation or loss of majority by the bargaining representative. As the Board has explained (*The Century Oxford Mfg. Co.*, 47 N. L. R. B. 835, 846):

> Normally the administrative processes of the Act afford the best method of resolving doubts concerning employees' sentiment, once such sentiment has been tested in an election and a reasonable time has not since elapsed. Problems arising from alleged shifts of allegiance following Board elections are among the most difficult with which this Board is confronted. In considering such allegations the Board must balance the advantages of stability in collective bargaining against the desirability of affording employees full freedom of choice of representatives. The Board has attempted to achieve a balance between these conflicting policies by refusing to entertain representation petitions within a reasonable period after an election, except where unusual circumstances intervene. Without such a rule, collective bargaining would be deprived of stability, and administrative

> determinations would become ephemeral. [Footnotes omitted.] [7]

Within the framework of these broad considerations, the Board has long held that in the ordinary case one year of immunity from challenge to its representative status would afford a certified union the necessary "reasonable period" to accomplish what the statute seeks to foster, namely, "the friendly adjustment" through collective bargaining "of industrial disputes arising out of differences as to wages, hours, or other working conditions." [8] Section 1, *infra*, pp. 50, 52–53. The Board has set forth its rule as follows (*Celanese Corp. of America*, 95 N. L. R. B. 664, 671–672):

> In the interest of industrial stability, this Board has long held that, absent unusual circumstances, the majority status of a certified union is presumed to continue for one year from the date of certification. In practical effect this means two things:

---

[7] See, also, *Kimberly-Clark Corp.*, 61 N. L. R. B. 90, 92; *General Box Co.*, 82 N. L. R. B. 678, 681–682; *Soss Mfg. Co.*, 56 N. L. R. B. 348, 352; *Whittier Mills Co.*, 15 N. L. R. B. 457, 463; *Botany Worsted Mills*, 41 N. L. R. B. 218, 230; *American Steel Foundries*, 85 N. L. R. B. 19, 20; N. L. R. B., *Fifteenth Annual Report*, 1950 (Govt. Print. Off. 1951), p. 74; *Sixteenth Annual Report*, 1951 (Govt. Print. Off. 1952), p. 83.

[8] See N. L. R. B., *Fourth Annual Report*, 1939 (Govt. Print. Off. 1940), p. 76; N. L. R. B., *Fifth Annual Report*, 1940 (Govt. Print. Off. 1941), p. 56; N. L. R. B., *Seventh Annual Report*, 1942 (Govt. Print. Off. 1943), p. 56; and cases cited there.

> (1) That the *fact* of the union's majority during the certification year is established by the certificate, without more, and can be rebutted only by a showing of unusual circumstances; and (2) that during the certification year an employer cannot, absent unusual circumstances, lawfully predicate a refusal to bargain upon a doubt as to the union's majority, even though that doubt is raised in good faith. However, after the first year of the certificate has elapsed, though the certificate still creates a presumption as to the fact of majority status by the union, the presumption is at that point *rebuttable* even in the absence of unusual circumstances.[9]

Consistently with this rule the Board has uniformly held, as here, that a voluntary repudiation by employees of their duly elected collective bargaining representative or intervening shift in their choice of representatives does not, without more, constitute the special circumstances which

---

[9] The same principles have been applied where the bargaining relationship is established by a settlement agreement made between the parties, with Board approval, disposing of unfair labor practice charges. *Poole Foundry and Machine Company* v. *National Labor Relations Board*, 192 F. 2d 740, 742–743 (C. A. 4), certiorari denied, 342 U. S. 954. Similarly, where a certification is challenged by the employer and litigation is required to establish its validity, the protected period has been held to run from the date of the court decree enforcing the Board's bargaining order which was based upon the certification. *Semi-Steel Castings Co.*, 88 N. L. R. B. 609, 610; N. L. R. B., *Fifteenth Annual Report*, 1950 (Govt. Print. Off. 1951), p. 74.

suspend the application of the rule nor serve to relieve the employer of his duty to bargain with the elected representative for a reasonable period, usually one year, following the election.[10]

B. THE BOARD'S "REASONABLE PERIOD" RULE REPRESENTS AN APPROPRIATE AND VALID ACCOMMODATION BETWEEN THE DUAL STATUTORY OBJECTIVES TO FOSTER STABILITY IN INDUSTRIAL RELATIONS AND TO ASSURE EMPLOYEES FULL FREEDOM OF SELF-ORGANIZATION

As we have noted (*supra*, pp. 15–17), it is the duty and responsibility of the Board to weigh the "countervailing considerations" and to determine

---

[10] N. L. R. B., *Eighteenth Annual Report*, 1953 (Govt. Print. Off. 1954), p. 43; *Seventeenth Annual Report*, 1952, pp. 160–161; *Sixteenth Annual Report*, 1951, pp. 188–189; *Fifteenth Annual Report*, 1950, p. 118; *Twelfth Annual Report*, 1947, p. 13; *Eleventh Annual Report*, 1946, p. 17; *Ideal Roller & Mfg. Co.*, 109 N. L. R. B. No. 47; *The Baker and Taylor Co.*, 109 N. L. R. B. No. 38.

The Board has found the existence of special circumstances warranting an exception to its rule in the following circumstances: where the bargaining representative switched its affiliation from one international union to another, so that the identity of the bargaining representative became doubtful and the stability of the bargaining relationship was threatened (*Armour & Co.*, 12 N. L. R. B. 49; *Carson Pirie Scott & Co.*, 69 N. L. R. B. 935, 938; *Swift & Co.*, 94 N. L. R. B. 917, 919; *General Electric Co.*, 96 N. L. R. B. 566, 569); where the number of employees doubled or quadrupled in the space of a year (*Westinghouse Electric & Manufacturing Co.*, 38 N. L. R. B. 404; *Celanese Corporation of America*, 73 N. L. R. B. 864); where the certified union has become defunct (*Henry Heide, Inc.*, 107 N. L. R. B. No. 258; *C & D Batteries*, 107 N. L. R. B. No. 261; *Helena Rubinstein*, 47 N. L. R. B. 435, 437; *Public Service Electric and Gas Co.*, 59 N. L. R. B. 325, 327). None of these circumstances is, or is claimed to be, present here.

how long the certification shall be effective. See, *e. g., National Labor Relations Board* v. *Seven-Up Company,* 344 U. S. 344, 346–349. If the Board's determination is reasonable and has support in the purposes of the Act, the courts do not substitute their own judgment for the administrative policy. We believe that the factors supporting the Board's rule clearly sustain its propriety and validity, and the arguments which petitioner brings against it are far from enough to call for its overthrow by the Court.

1. The Act authorizes the Board to direct an election by secret ballot whenever a question concerning representation arises and to certify the results. *Supra,* pp. 14–15. Implementing the statute, the Board has prescribed that a secret election under the supervision of Board agents may be held for this purpose either pursuant to a consent election agreement between the parties or pursuant to a formal hearing and direction of election by the Board.[11] Prior to the election, official notices of election are posted at appropriate places, reproducing a sample ballot and outlining such election details as location of polls, time of voting, and eligibility rules. At the election, challenges may be made by Board agents or by the authorized observers representing the parties. Objections to the conduct of the election may be filed

[11] N. L. R. B., Rules and Regulations, Series 6, as amended, Secs. 102.52–102.64; and Statements of Procedure, effective June 3, 1952, Secs. 101.16–101.20.

within a prescribed time and, if any are filed, they are investigated and decided by the Regional Director who conducted the election or by the Board, sometimes after formal hearing. If the election results in a majority for a claimant, the Board certifies it as the bargaining representative of the employees within the bargaining unit.

Manifestly, an election by secret ballot, hedged by the careful safeguards which the Board has adopted, affords "the most effective way of getting an untrammelled expression of the desires of the electorate" (*National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881 (C. A. 3), certiorari denied, 319 U. S. 751), as well as "the most reliable means of ascertaining the deliberate will of the employees" (*Century Oxford Mfg. Corp., supra*, 140 F. 2d at p. 543).[12] Once the employees have formally and deliberately registered their choice while under full governmental

[12] It is for this reason that the Board does *not* apply its "reasonable period" rule where the employees have indicated their choice informally, as by membership cards, petitions, and the like. In those situations the Board holds that, absent any intervening employer unfair labor practice, the employees may repudiate their representative at will at any time prior to the consummation of a collective bargaining agreement. *Henry Weis Manufacturing Company, Inc.*, 49 N. L. R. B. 511; *Frigo Bros. Cheese Corp.*, 50 N. L. R. B. 464, 473; *Joe Hearin, Lumber*, 66 N. L. R. B. 1276, 1283 and 68 N. L. R. B. 150; *Electro Metallurgical Co.*, 69 N. L. R. B. 772, 774–775; *Products Mfg. & Engineering Corp.*, 73 N. L. R. B. 233, 234–235; *Bell Cabinet Co.*, 73 N. L. R. B. 332, 334–335; *National Waste Material Corp.*, 93 N. L. R. B. 477, 478–479.

protection and through secret ballot, the public interest in preserving stable industrial relations, as well as the practical operation of the collective bargaining process, would seem to require that there be some measure of permanence to the relationship and the employees held to their choice for a reasonable period of time. Indeed, Congress itself implicitly recognized in its study of the bill which became the original Act that the aim of the statute to secure industrial peace through collective bargaining would be frustrated, if not defeated, unless the bargaining representative deliberately and formally chosen by the employees in a Government-sponsored election be permitted to function, free from challenge to its representative status, for a reasonable time. Thus, the Senate Committee reporting the original Act stated with respect to the representation provisions of the statute, "Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. * * * Such a course provokes constant strife, not peace." S. Rep. No. 573, 74th Cong., 1st Sess., p. 12. Sharing a similar view, the House Committee declared that it adhered "to the common belief that the device of an election in a democratic society has, among other virtues, that

of allaying strife, not provoking it." H. Rep. No. 1147, 74th Cong., 1st Sess., p. 22.

The legislative purpose, to introduce a measure of stability in industrial relations and allay strife, would probably fail of achievement unless, as this Court has pointed out, "a bargaining relationship once rightfully established [is] permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, 705. Since the passage of the original Act, the Courts of Appeals, with the exception of the Sixth Circuit, have recognized with almost unvarying uniformity that this principle is indispensable to the practical operation of the collective bargaining process to effectuate the Congressional purpose and that it represents an appropriate and valid accommodation of the basic statutory policies. The First, Second, Third, Fourth, Fifth, Seventh and Ninth Circuits have all taken this view. As the Court of Appeals for the Fourth Circuit, in a statement aptly summarizing a host of cases, has declared, "Inasmuch as a major objective of the * * * Act is to bring about a contract binding on both parties with some fair degree of permanence * * * a certification must be endowed with a longevity sufficient to accomplish its essential purpose." *National Labor Relations Board* v. *Appalachian Electric Power Co.*,

140 F. 2d 217, 221. See also the statement of Judge Learned Hand, quoted *supra*, pp. 13–14.[13]

---

[13] *Accord: National Labor Relations Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, 542 (C. A. 2), certiorari denied, 323 U. S. 714; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881–882 (C. A. 3), certiorari denied, 319 U. S. 754; *National Labor Relations Board* v. *Worcester Woolen Mills Corp.*, 170 F. 2d 13, 17 (C. A. 1), certiorari denied, 336 U. S. 903; *National Labor Relations Board* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64 (C. A. 3); *National Labor Relations Board* v. *Borchert*, 188 F. 2d 474, 475 (C. A. 4); *National Labor Relations Board* v. *Sanson Hosiery Mills, Inc.*, 195 F. 2d 350, 352 (C. A. 5), certiorari denied, 344 U. S. 863; *National Labor Relations Board* v. *Prudential Insurance Co.*, 154 F. 2d 385, 389 (C. A. 6); *National Labor Relations Board* v. *Grieder Machine Tool and Die Co.*, 142 F. 2d 163, 165 (C. A. 6), certiorari denied, 323 U. S. 724; *Superior Engraving Co.* v. *National Labor Relations Board*, 183 F. 2d 783, 792 (C. A. 7), certiorari denied, 340 U. S. 930; *National Labor Relations Board* v. *Arnold Motor Co.*, 173 F. 2d 397, 399 (C. A. 7). *Contra: National Labor Relations Board* v. *Vulcan Forging Co.*, 188 F. 2d 927 (C. A. 6); *Mid-Continent Petroleum Corp.* v. *National Labor Relations Board*, 204 F. 2d 613 (C. A. 6), certiorari denied, 346 U. S. 856. See also fn. 21, *infra*, pp. 45–46.

Where the loss of majority is attributable to the employer's unfair labor practices, the courts have, of course, followed this Court's decision in *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, that the Board may require the employer to bargain with the union for a reasonable time despite the loss of majority status. *National Labor Relations Board* v. *Swift and Co.*, 162 F. 2d 575, 584–585 (C. A. 3), certiorari denied, 332 U. S. 791; *National Labor Relations Board* v. *Harris-Woodson Co.*, 162 F. 2d 97, 99–100 (C. A. 4); *National Labor Relations Board* v. *Norfolk Shipbuilding and Drydock Corp.*, 172 F. 2d 813, 816 (C. A. 4); *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. 2d 755, 759–

A contrary rule, as the courts have recognized, would "make chaos out of the administration of the statute and prevent the protection of the very rights which it aimed to secure." *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881 (C. A. 3), certiorari denied, 319 U. S. 751. The consequences which would flow from such a rule and the manner in which it would tend to defeat the Congressional policy are manifest. It would render difficult, if not impracticable, the making of collective agreements. As the Court of Appeals for the Fourth Circuit has explained in the *Appalachian Electric Power Co., supra,* 140 F. 2d at pp. 221–222:

> * * * To assume that the Board's certification speaks with certainty only for the day of its issuance and that a Company may, with impunity, at any time thereafter refuse to bargain collectively on the ground that a change of sentiment has divested the duly certified representative of its majority

760 (C. A. 4); *National Labor Relations Board* v. *Taormina*, 207 F. 2d 251 (C. A. 5); *National Labor Relations Board* v. *Kress & Co.*, 194 F. 2d 444, 446 (C. A. 6); *Valley Mould and Iron Corp.* v. *National Labor Relations Board*, 116 F. 2d 760, 764–765 (C. A. 7), certiorari denied, 313 U. S. 596; *Superior Engraving Co.* v. *National Labor Relations Board*, 183 F. 2d 783, 794, 795 (C. A. 7), certiorari denied, 340 U. S. 939. But see, *National Labor Relations Board* v. *Inter-City Advertising Co.*, 154 F. 2d 244 (C. A. 4), limited upon rehearing to the "peculiar facts" of that case (unreported order of the U. S. Court of Appeals dated May 7, 1946, in case Docket No. 5440), *infra*, p. 46, fn. 21.

status would lead to litigious bedlam and judicial chaos. Indeed, if the Company's contention were correct, the Board's certification might even be obsolete and subject to nullification by an interim informal Gallup poll vote on the very day of its issuance. * * *

* * * * *

"The very nature of the subject matter with which the Act deals leaves no room for (the Company's) contention. Employer-employee relations entail a flowing stream of human relations and attitudes, continually modified by innumerable environmental variations, by day to day changes in desires and moods and by the bargaining process itself. It may be, therefore, that each successive day presents a different picture of employee attitudes, and that successive redeterminations of the employees' choice might record with greater precision the shifting currents in the bargaining unit. For this very reason, however, a showing of present change cannot serve to abate the effect of the Board's certification. Neither the Board nor the courts can stand by continually, and constantly reexamine the state of the everchanging stream to redetermine the authority of a recently designated representative. Necessarily the line must be drawn at some point in time; and when the fact-finding body, pursuant to statutory authority and upon a fair and secret election, makes a determination of the will of

the employees, its certification must be accorded a durability consistent with the practical administration of the legislative policy.

* * * * *

"Under (the Company's) construction, however, this Congressionally encouraged process of peaceful negotiation would have to be conducted with the knowledge on the part of both bargainers that the authority of one of them was currently subject to revocation by the first shift of employee sentiment that might occur. To the recalcitrant employer, such an interpretation would be an invitation to procrastinate. To the law-abiding employer it would be a deterrent to the honest expenditure of time and effort in bargaining, for he would have no assurance whatever that, by the time the negotiations were completed, the Union would still be in a position to join in a binding contract. To the Union, it would be a spur to hasty and unconsidered action in order to anticipate the possibility that at some point during extended good-faith bargaining enough employees might waver in their support to reduce the Union's majority, even momentarily, to a minority."

The disruptive impact of a statutory interpretation permitting employees to repudiate at will their duly elected bargaining representative extends beyond the initial stages of negotiation. Collective bargaining involves, of course, more than the making of an agreement. It includes,

also, the enforcement and interpretation of the agreement throughout the months of its duration. For "[i]nevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees." *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 338. One of the functions of the bargaining representative is to negotiate concerning these differences and to attempt to resolve them. See *Elgin, Joliet and Eastern Ry.* v. *Burley,* 325 U. S. 711; Section 9 (a), *infra,* p. 55. To permit employees to repudiate their duly elected representative which is a party to the collective bargaining agreement would result in leaving them either without a representative to administer the contract or else, possibly, with a series of representatives, all strangers to the collective agreement, to administer it as best as they could or perhaps to repudiate it. Neither result is "conducive to harmonious labor relations" (S. Rep. No. 573, 74th Cong., 1st Sess., p. 13).

Also, as the court below pointed out (R. 83), if the employees are free to repudiate at will their duly elected representative, a Board conducted election "instead of inaugurating a period of industrial repose, would lead only to continued raiding of the bargaining agent's membership and the disrupting influence of rival union activities within the bargaining unit." The election device, as Congress saw it, was for the purpose of "al-

laying strife, not provoking it" (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 22) and to put at rest, for a time, in the interest of "harmonious labor relations," the divisive and disruptive influences which "numerous warring factions" competing for the employees' support necessarily provoke (S. Rep. No. 573, 74th Cong., 1st Sess., p. 13). This objective can hardly be achieved if the election does not settle for a reasonable time the choice of bargaining representative.

In contrast, the Board's policy serves "the dual purpose of encouraging the execution of a collective bargaining contract and enhancing the stability of industrial relations" (*Centr-O-Cast & Engineering Co.*, 100 N. L. R. B. 1507, 1508). At the same time, it preserves to the employees "the right to challenge the representative status of an incumbent union at predictable and reasonable intervals" (*American Steel Foundries*, 85 N. L. R. B. 19, 20). The policy thus recognizes the necessity in a democratic scheme of representation, which the Act adopts, of subordinating, for a time, shifts in employee sentiment in favor of a reasonable measure of stability in employer-employee relations and thereby attaining the statutory goal of industrial peace under collective agreements. This is but an adaptation of the rule " 'sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions' " (*National Labor Relations Board* v. *Tower Co.*, 329 U. S. 324, 331,

332) which temporarily ignores shifts in the sentiment of the electorate in favor of stability in government. *National Labor Relations Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, 542–543, certiorari denied, 323 U. S. 714. The Board's policy thus accords with the basic scheme of the representation procedures of the Act. For, it was "our governmental practices, * * * business procedure, and * * * the whole philosophy of democratic institutions" that prompted Congress to adopt the principle of majority rule incorporated in Section 9 of the Act. S. Rep. No. 573, 74th Cong., 1st Sess., p. 13; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. This principle has been applied, not only in the political realm but also in corporations, clubs, societies, and associations of all types, to keep representatives or officials in office for a given period despite interim dissatisfaction or repudiation by the "electorate."

This Court's decision in *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, illustrates and confirms the necessity of subordinating, for a time, the employees' freedom to select representatives to other statutory objectives. There, the Board issued an order requiring the employer to bargain with a union despite the claim that, following the employer's illegal refusal to bargain with it, the union, as a result of a turnover among the employees in the unit, no longer represented a majority of them. Uphold-

ing the order, this Court declared (321 U. S. at 705–706):

> * * * The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. * * * That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement. * * *
>
> Contrary to petitioner's suggestion, this remedy, as embodied in a Board order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. See *Great Southern Trucking Co.* v. *Labor Board*, 139 F. 2d 984, 987. But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. See *Labor Board*

> v. *Appalachian Power Co.*, 140 F. 2d 217, 220–222; *Labor Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881–882. After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships. * * *

The loss of majority in the instant case, unlike *Franks Bros.*, was not attributable to any unfair labor practices on petitioner's part. But just as the Board in the *Franks Bros.* case properly subordinated the employees' freedom of choice for a period in order to safeguard against "a stubborn refusal to abide by the law," so here, we submit, the Board has appropriately restricted for a time the employees' freedom of choice in order to achieve another and equally important statutory purpose—stability in labor relations.

2. It is urged, however, that the Board's rule, suspending for a period the employees' right to repudiate a bargaining representative, is at odds with orthodox agency concepts which permit conventional principals to revoke at will the authority of their agents. See Pet. Br. 5 *ff.*; *Mid-Continent Petroleum Corp.* v. *National Labor Relations Board*, 204 F. 2d 613 (C. A. 6), certiorari denied, 346 U. S. 856; and dissenting opinion of Mr. Justice Rutledge in *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 696. But this contention overlooks the

important factor that in the Act Congress has provided for relationships "not only unknown to the common law but often in derogation of it" (*National Labor Relations Board* v. *Colten*, 105 F. 2d 179, 182 (C. A. 6)). Hence, as Mr. Justice Rutledge, speaking for this Court, said, in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 125: "It will not do, for deciding this question * * *, to import wholesale the traditional common-law conceptions * * * as exclusively controlling limitations upon the scope of the statute's effectiveness." Thus, for example, in *Medo Photo, supra*, the argument was advanced that an employer could lawfully by-pass the designated bargaining representative and deal directly with the employees because under common law concepts "any powers the union may acquire by virtue of the designation would end whenever those who confer them and on whose behalf they are to be exercised take them back of their own accord into their own hands and exercise them for themselves" (321 U. S. at 696). This Court, giving decisive weight to the scheme of collective bargaining envisaged by the Act, rejected the argument, saying, "The statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent * * *" (321 U. S. at 687).

The Act is, after all, a labor relations statute, concerned with the adjustment through collective bargaining of disputes arising out of differences as to wages, hours, or working conditions. Necessarily, the measure of permanence to be accorded to the designation of a bargaining representative must be determined with reference to the purpose of the Act and its practical operation. Congress could not have intended that the resolution of this problem was to turn solely upon technical common law concepts developed in a context wholly unrelated to the Act's purpose and provisions. Cf. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 120–129. Indeed, Section 9 (a) of the Act (*infra,* p. 55) reflects the Congressional purpose to avoid any strict application of conventional agency rules to the representation procedures of the Act. Under that provision the representative designated by a majority of the employees in the appropriate bargaining unit is the exclusive representative of all of the employees in the unit and is under a statutory obligation to represent all of them. *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 337. If orthodox agency principles controlled, the union would neither be vested with such power nor subject to that obligation.[14]

---

[14] Section 2 (13) of the Act does not militate against this conclusion. That section provides:

"In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible

It has also been suggested that while in the case of a large group of employees "a reasonable degree of stability in employment relations may require, to give the statute workable operation," that the representative status of a bargaining agent be valid and conclusive for a reasonable period, such a limitation upon the employees' freedom can have no application to a small group, as here, whose wishes may be easily and readily ascertained at any time. See Mr. Justice Rutledge dissenting in *Medo Photo, supra.* But the problem is not one of proof. Rather, it is one of effectuating the statutory policy of insuring a reasonable degree of stability in industrial relations. The "workable operation" of the statute is as much hampered by instability in small units as in larger ones and, bearing in mind the objective to be attained, the Board is not compelled to distinguish between the two.

Finally, it is asserted that it "would seem to be the antithesis of the stabilization of labor relations" to compel employees to bargain through a representative which they have repudiated. *Mid-*

---

for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

The legislative history of this provision indicates that its purpose was to make the ordinary "law of agency as it has been developed at common law" the controlling test for determining employer or union responsibility for misconduct under the Act. 93 Cong. Rec. 6858–6859. The legislative history, as well as the text of Section 2 (13), clearly establish that it has no relevance to the issue presented here.

*Continent Petroleum* case, *supra*, 204 F. 2d at p. 622. This assertion rests, apparently, upon the premise that the repudiated representative may not be fully responsive to the employees' wishes and that the employees will therefore become restive. This fear would appear to be more speculative than real. The representative is, of course, under an enforcible statutory obligation to make "an honest effort to serve the interests" of all whom it represents and "is responsible to, and owes complete loyalty to" those interests. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 337–338. See also *Steele* v. *Louisville & Nashville Co.*, 323 U. S. 192, 201–202. The Board itself, in exercising its power to determine and certify bargaining representatives under Section 9 of the Act, has asserted its correlative power to police and revoke certifications in the face of various forms of conduct held incompatible with the representatives' duties. *Hughes Tool Co.*, 104 N. L. R. B. 318; N. L. R. B., *Eighteenth Annual Report*, 1953 (Govt. Print. Off. 1954), pp. 19–20. And it would scarcely be in the self-interest of the representative to be derelict in the discharge of its obligations and to fail to give adequate heed to the wishes of the employees because it was currently in disfavor with a majority of them. Indeed, practical experience would suggest that in those circumstances the representative might well intensify its efforts to carry out the wishes of its

constituency and thereby regain its favor.[15] Moreover, it is commonplace in our society for political bodies, social clubs, groups and organizations of all types to function through representatives, officers, or managers elected for a stated period—even though those functionaries would be ousted if an interim or "spot" election were held at the particular moment. The device of the "recall" has not yet become established in our political or social structure.

C. CONGRESS, IN THE AMENDED ACT, RECOGNIZED AND APPROVED THE BOARD'S "REASONABLE PERIOD" RULE

The amended Act and its legislative history demonstrate, we believe, that Congress approved and ratified the Board's long-established rule that the election of a bargaining representative is valid and conclusive for a reasonable period of time, usually one year.

The amendments to the Act adopted by Congress in 1947 and 1951 reflect on their face the legislative purpose to give a measure of permanence to a Board certification of bargaining representatives and to hold the employees to their choice for a reasonable time.[16] Thus, Section 9 (c) (3) (*infra,*

[15] "It should always be remembered that almost always the negotiators have two or three audiences: there is the opposing side, the home constituency, and the general public. It is always thus with legislators and representatives." Daugherty, Carroll R., *Labor Problems In American Industry* (5th ed., 1941) p. 450. See also Gardner, B. B. and Moore, D. G., *Human Relations In Industry* (1950) pp. 136–148.

[16] The employees in the instant case repudiated the Union immediately after the election but before the Board's certifi-

p. 57) provides: "No election shall be directed [by the Board] in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." [17] In order to protect the certified union in its representative status, and again demonstrating the measure of respect to be accorded to a Board certification of representatives, Congress in Section 8 (b) (4) (C) (*infra*, pp. 53–55) made it an unfair labor practice for a union to engage in a strike for the purpose of forcing or requiring any employer to bargain with a particular labor organization ~~unless such~~ another organization has been certified as the representative of such employees pursuant to the provisions of Section 9. Congress also provided that the 1947 amendments should not affect any certification of representatives which was made under Section 9 prior to the effective date of the amended Act until one year after the date of such certification. Section 103, *infra*, p. 58.

---

cation issued. This factor does not affect the argument here. The certification merely certifies the election results. The warrant for the Board's rule is not that the Board specifically issued a certification but rather, as we have sought to demonstrate *supra*, that once the employees have formally signified their choice in a Board conducted election, the public interest in preserving stable industrial relationships requires that they be held to it for a reasonable time.

[17] If petitioner were correct in his position, he would be freed from bargaining with the Union, but for the rest of the certification year no new election could be held to determine a bargaining representative.

Congress' purpose to give validity and finality for a reasonable period to Board elections is also reflected in the union security amendments adopted in 1947 and 1951. Under the 1947 amendments the employees' bargaining representative could enter into a union security agreement with the employer, as permitted by the Act, provided that the employees by secret ballot in a Board conducted election authorized the union to execute such agreement. The amendments further provided that not more than one valid election might be held in a 12-month period for the purpose of conferring such authority upon the bargaining representative or rescinding it. Section 9 (e) (1), (2) and (3), *infra*, pp. 57–58. Although under the 1951 amendments to the Act it is no longer necessary to conduct such a vote for that purpose,[18] the Act as it now stands provides that, where there is in effect a union security agreement, the Board, upon appropriate showing, shall conduct an election to determine whether the employees desire to eliminate the union security provisions of the agreement. Such elections, like elections under Section 9 (c), cannot be held more often than once a year. Section 9 (e) (2), *infra*, p. 58.

Following the 1947 amendments, the Board in 1949 reported to Congress and to the President that "Section 9 (c) (3) of the amended statute, which proscribes the holding of more than one

[18] Act of October 22, 1951, 65 Stat. 601–602.

valid election in a bargaining unit or any subdivision thereof in a 12-month period [for the purpose of designating a bargaining representative], amounts in part to a codification of the Board's 1-year certification rule."[19] The legislative history of that Section confirms that report.

The debates on the amendments and proposed amendments, as well as the committee reports in both the Senate and the House, disclose that Congress was fully familiar with the Board's one-year rule and after the most careful deliberation approved it. Thus, Senator Taft, urging the adoption of Section 9 (c) (3), explained (93 Cong. Rec. 3838):

> The bill also provides that elections shall be held only once a year, so that there shall not be a constant stirring up of excitement by continual elections. *The men choose a bargaining agent for one year. He remains the bargaining agent until the end of that year.* [Emphasis added.]

And the Senate Report (S. Rep. No. 105, 80th Cong., 1st Sess., p. 25) stated that:

> This amendment prevents the Board from holding elections more often than once a year in any given bargaining unit unless the results of the first election are inconclusive by reason of none of the competing unions having received a majority. At present, if the union loses, it may on pre-

[19] N. L. R. B., *Thirteenth Annual Report*, 1948 (Govt. Print. Off. 1949), p. 31.

> sentation of additional membership cards secure another election within a short time, but *if it wins its majority cannot be challenged for a year.* [Emphasis added.]

Significantly, too, the Report added (p. 25) that the amendments to the Act did not effect "the present Board's rules of decisions with respect to * * * the existence of an outstanding collective agreement as a bar to an election." [20]

These Senate statements confirming the Board's 1-year certification rule are paralleled by the corresponding history in the House. The House bill prohibited more than a single valid election in the course of a year, *except upon the petition of employees requesting decertification of a bargaining representative.* H. R. 3020, 80th Cong., 1st Sess., Secs. 9 (f) (7), 9 (c) (2) (April 11, 1947); H. Rep. No. 245, 80th Cong., 1st Sess., 39. This provision was severely criticized on the floor of the House because it negatived "present law" by which "a certification is presumed to be valid for a reasonable period of time—normally a year." "This [proposed] provision," it was argued, since it permits employees to repudiate their representative within the certification year, "plays havoc with stability of relationships."

---

[20] The Board has held that, in general, a valid written collective bargaining agreement constitutes a bar to a current determination of representatives among the employees covered by the contract until shortly before its terminal date. N. L. R. B., *Twelfth Annual Report*, 1947 (Govt. Print. Off. 1948), p. 9; *Eighteenth Annual Report*, 1953, p. 13.

93 Cong. Rec. 3446–47; see also, 93 Cong. Rec. 3528. To the extent that it permitted decertification within the certification year, this provision was thereafter eliminated in conference, the House conferees explaining that the "conference agreement adopts the provisions of the Senate amendment." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 49. Thus, Section 9 (c) (3) as adopted by Congress retained in full the long-applied underlying principle that "In order to impress upon employees the solemnity of their choice, when the Government goes to the expense of conducting a secret ballot, * * * elections in any given unit may not be held more frequently than once a year." S. Rep. No. 105, 80th Cong., 1st Sess., p. 12. In this fashion Congress, consistently with its basic approach to the representation procedures of the Act (*supra*, pp. 24–25, 31–32), once more manifested its intention to make representation elections "conform more closely to public elections." *Id.*

The legislative history thus establishes that Congress was well aware of the "reasonable period" rule adopted by the Board and almost uniformly approved by the courts; that it was the object of explicit mention and approval in Congress; and that Section 9 (c) (3) was designed, as the Board subsequently reported, to codify that rule (*supra*, pp. 41–42). Even if that purpose cannot be attributed to Section 9 (c) (3), it is a fair inference from all the circum-

stances, as the court below pointed out (R. 79), that Congress accepted this administrative and judicial construction of the Act. Cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365, 366; *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 923 (C. A. 6), certiorari denied, 342 U. S. 859; *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 161 (C. A. 7). It is therefore with the firmest legislative basis that, since the enactment of the amended Act in 1947, all but the Sixth Circuit of the courts of appeals which have had occasion to consider the issue have expressed approval of the Board's "reasonable period" rule. *National Labor Labor Relations Board* v. *Worcester Woolen Mills Corp.*, 170 F. 2d 13, 17 (C. A. 1), certiorari denied, 336 U. S. 903; *National Labor Relations Board* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64, 69 (C. A. 3); *National Labor Relations Board* v. *Sanson Hosiery Mills*, 195 F. 2d 350, 352, 353 (C. A. 5), certiorari denied, 344 U. S. 863; *Superior Engraving Co.* v. *National Labor Relations Board*, 183 F. 2d 783, 792 (C. A. 7), certiorari denied, 340 U. S. 930. See also *supra*, pp. 25–27.[21]

[21] In the *Globe Automatic Sprinkler* case, *supra* (heavily relied on at Pet. Br. 8, 10–11), the Third Circuit, although approving of the "reasonable period" rule, declined to apply a rigid one-year period in a situation where the employer in good faith challenged the union's representative status three weeks before the expiration of the certification year.

In this connection, it may also be pointed out that the

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

SIMON E. SOBELOFF,
*Solicitor General.*

GEORGE J. BOTT,
*General Counsel,*
DAVID P. FINDLING,
*Associate General Counsel,*
DOMINICK L. MANOLI,
*Assistant General Counsel,*
FANNIE M. BOYLS,
WILLIAM J. AVRUTIS,
*Attorneys,*
*National Labor Relations Board.*

SEPTEMBER 1954.

---

Sixth Circuit in *Mid-Continent Petroleum* (*supra*, p. 26), in rejecting the Board's rule, failed to recognize any distinction between a bargaining representative whose status is established through a Board-conducted election and one established by other, informal means (see fn. 12, *supra*, p. 23), or any distinction between defections occurring within the certification year and those occurring later. Thus, in support of its position it cited indiscriminately cases in which the majority had been established by a check of union membership cards (*National Labor Relations Board* v. *Holly-*

*wood-Maxwell Co.*, 126 F. 2d 815 (C. A. 9); *National Labor Relations Board* v. *Standard Steel Spring Co.*, 180 F. 2d 942 (C. A. 6); *National Labor Relations Board* v. *Mayer*, 196 F. 2d 286 (C. A. 5)) and a case in which the certification was more than ten years old (*National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144 (C. A. 7)). In one other case cited by that court, *National Labor Relations Board* v. *Inter-City Advertising Co.*, 154 F. 2d 244 (C. A. 4), less than a year after the certification had elapsed when it appeared that following a reorganization of the employer's business the union no longer represented a majority. However, the Fourth Circuit on petition for rehearing made clear that its decision was limited to the "peculiar facts" of that case (unreported order of the U. S. Court of Appeals dated May 7, 1946, in case Docket No. 5440); and subsequently that court in *National Labor Relations Board* v. *Borchert*, 188 F. 2d 474, 475, enforcing in part 90 NLRB 944, again cited with approval its prior holding in *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, which expressly approved the Board's rule.

# APPENDIX

**1. The relevant provisions of the National Labor Relations Act as originally enacted (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. (1946 ed.), 151, *et seq.*), are as follows:**

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to

aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties,

in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

2. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C. 151, *et seq.*), are as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of

contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and

eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this

Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles,

materials, or commodities or to perform any services, where an object thereof is: * * * (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; * * *

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights

guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:
* * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * *

(c) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify

the results thereof to such labor organization and to the employer.

(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

SEC. 9. * * *[1]

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

* * * * *

EFFECTIVE DATE OF CERTAIN CHANGES

* * * * *

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect to any such

[1] As amended by the Act of October 22, 1951, 65 Stat. 601–602.

certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

U. S. GOVERNMENT PRINTING OFFICE: 1982